

FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL , KOLKATA BENCH

APPLICATION NO : O.A NO. 117 OF 2012

ON THIS 10<sup>th</sup> DAY OF APRIL, 2013

CORAM

HON'BLE JUSTICE RAGHUNATH RAY , MEMBER (JUDICIAL )

HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Hav Bal Bahadur Katuwal,  
Son of Sri Gyan Bahadur Katuwal ,  
Village Upper Dilaram, Chaukidada,  
P.O. Bagora, Pin – 734 224,  
District Darjeeling, West Bengal.

.....Appellant

-VS-

1. Union of India through  
The Secretary,  
Ministry of Defence, South Block,  
New Delhi.
2. The Chief of Army Staff,  
Integrated HQ of MoD (Army),  
DHQ PO,  
New Delhi.
3. The Chief Records Officers,  
39, Gorkha Training Centre,  
Varanasi Cantonment,  
Uttar Pradesh, PIN – 221002.
4. The Officer Commanding,  
3/9 GR (Chindits),  
C/O 56 APO, PIN 910 253.

..... Respondents

For the petitioner: Mrs. Maitrayee Trivedi Dasgupta, Advocate

For the respondents: Mr. Souvik Nandy, Advocate

### **JUDGEMENT AND ORDER**

#### **Per HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)**

This matter relates non-grant of promotion to the rank of Naib Sudedar despite the applicant being eligible for such promotion. The applicant is an ex-Havildar of 3/9 GR (Gorkha Rifles) who had retired in the rank of Havildar though, as submitted by him, he could have been promoted to the next rank i.e. of Naib Subedar that would have automatically enhanced service span as per the stipulated terms and conditions of service. Being aggrieved, he has approached this Tribunal through this Original Application seeking the intervention of this AFT to enable his promotion to the rank of Naib Subedar.

2. The case in brief is that the applicant was enrolled in 9 GR on 10.11.1988 and his date of birth is 16.12.1967. He was promoted to the rank of Havildar on 01.12.2004. After having obtained all qualifications for promotion to the rank of Naib Subedar he was expecting that his promotion could have been on 01.07.2012 as per the seniority of Havildars in 3/9 GR, which is his battalion. Unfortunately, he became overage on 16.12.2011 when he completed 44 years of age. As per Para 149© of Regulation for Army, 1986, as amended, he could not be promoted to

the rank of Nb Sub once he is over the age of 44. Moreover, as per the ibid Regulation, as amended, by Ministry of Defence Circular dated 03.05.1999 quoted below:

*“...unlike promotion policy in case of clerks and tradesmen. General Duty Soldiers in infantry are promoted based on unit seniority and vacancy and not the vacancies available in other Battalions of the Regiment....”*

3. The applicant completed 24 years of service on 09.11.2012 and was unwilling for further extension by two years. At the same time he completed 44 years of age on 16.12.2011, thus making him ineligible for promotion to the rank of Nb Sub for being overage for such promotion as per rules. As per the terms and conditions of service, a Havildar could serve up to 24 years of service extendable by two years or up to the age of 49 years, whichever is earlier. In this particular case, the length of service criteria of the applicant did not allow him to serve beyond 09. 11. 2012, when he completed 24 years of service, and therefore, he was discharged from service with effect from 01.12.2012 as per letter dated 09.12.2011 from Records Office of 39 GR (Annex. A-2).

4. The learned counsel for the applicant, Mrs. Dasgupta submitted that in case the applicant was not being able to be adjusted for promotion within the same Battalion, he could have been transferred to another Battalion within the same regiment where such vacancies were available. She also brought to our notice that there were two other Havildars of the same regiment, i.e. 9 GR but of different Battalion i.e. 2/9 GR, who, though junior to the applicant, were promoted to the rank of Nb Sub during October and December 2011 (Para VII of the OA). In view of the above, the learned counsel was of the view that the authorities took no effort to

transfer the applicant to another Battalion where his seniority would have enabled him such promotion. By not doing so, the authorities have treated him arbitrarily and unfairly by discharging him from service on 01.12.2012 in the rank of Havildar.

5. Mrs. Dasgupta, during her oral submission further made a point that upper age limit as laid down in clause © of Regulation 149 of RA, 1987 can be waived or relaxed by the Chief of the Army Staff so as to grant promotion to the applicant. In this regard, she draws our attention to a judgement of the Hon'ble Karnataka High Court in the case of Havildar N Bheeman vs Union of India {Equivalent citations: 2008 (1) Kar LJ 331} which has analysed the Regulation 149© of Regulation for Army, 1987 (Revised) to the extent that the COAS has the authority to exercise his power so as to decide upon relaxation of age criteria in accordance with law. The particular portion of the said judgement is quoted hereunder:-

*" ....7. Apart from such eligibility, regulation 149 of the Regulations for the Indian Army, Revised Edition, 1987, this reads as under:*

*149. Promotion – JCOs –*

*(a) NCOs except those given in sub Para (b) below will not normally be promoted to the rank of JCO if over 44 years of age or with more than twenty-two years' service.*

*(b) NCOs of the under mentioned categories will not be promoted to JCO rank if over 46 years of age or with more than 25 years of service:*

*(i) Clerks GD, GD (SD) and Store.*

*(ii) Storekeeper (Store man Technical)*

*(iii) Ammunition (Technicians) Examiners.*

*(iv) Personal Assistants (ASC)*

*© The age and service limits given in sub-paras (a) and (b) above may be waived in very exceptional cases with permission of the COAS.*

*Also imposes certain outer limit for consideration of a person for being promoted to the post of 'Naib Subedar' and Regulation – 149(a) which is the relevant regulation which applies to the petitioner indicates that if the [person is aged beyond 44 years he cannot be considered and also if the person had put in more than twenty two years of service then also he cannot be considered.*

*.....14. It is in this circumstances that the petitioner sought the aid of Regulation 149© which enables persons who do not fulfill the requirement under Sub-regulations (a) and (b) of Regulation – 149 to be given a waiver from fulfilling the criteria and that too with the permission of the Chief of Army Staff.*

*15. Though the version of the petitioner when the writ petition was presented was that in view of certain better educational qualification, the petitioner's case could have been considered as an exceptional case for relaxation of age criteria etc., nothing much is made out on such premise. But, as good luck may have it, the petitioner has come up with an application with the supporting document i.e. the communication from his Commanding Officer – the respondent No. 4 herein indicating that the petitioner's services were very impressive; that he has an impeccable record and is a person richly*

*deserving for according permission to waive the age limit as indicated in Regulation 149(a). It is such communication which has been produced as Annexure – A1 along with the IA for production of additional documents which has been ordered as indicated above. “*

Note: Subsequent to the ibid judgement, the upper service limit for promotion to the rank of Nb Sub has been raised from 22 to 24 extendable by two years.

6. Age Waiver --- Wherein the discretionary powers of the COAS for relaxation of age criteria for promotion has been clearly mentioned. She concluded her argument by bringing two points as under:-

(a) Firstly, the applicant could have been transferred to another Battalion like 2/9 GR where with his seniority he could have got promotion but no such effort was made.

(b) No effort was made to take up a case for relaxation of age criteria to enable the applicant to his due promotion by considering his service to be exceptional. He has served in various difficult and high altitude areas including in certain operational circumstances.

7. The respondents have relied on the facts of the case as have been submitted by the applicant in the ibid OA. During his oral submission, the learned counsel for the respondents, Mr. Souvik Nandy broadly relied on the aspects as has been mentioned in his counter affidavit. He emphasized on two issues. Firstly, as per the Rules, General Duty soldiers in Infantry are promoted based on unit/battalion seniority and vacancy; and not under vacancy available in other Battalions in the Regiment {Para 3 (c ) at page 3 of the counter affidavit}. Secondly, in

accordance with Para 149 (a) of Regulation of Army 1987 (Revised) the NCOs of the trade as that of the applicant (Soldier GD) cannot be promoted to the rank of Naib Subedar after he completes 44 years of age. In the present case, Mr Nandy submitted, the applicant completed 44 years of age on 16. 12. 2011 while vacancy for Nb Sub in his battalion (3/9 GR) was being available only on 01. 07. 2012. Therefore the extant rules unfortunately did not permit him to be promoted though he was otherwise qualified. Mr. Nandy, during his oral submission, drew our attention of these two aspects of Rules as stipulated in the Defence Service Regulations (Army) 1987 as amended. Mr. Nandy emphasized that the decision taken by the authorities to discharge him in the rank of Navildar for not meeting the required age criteria for promotion to the rank of Naib Subedar was taken by the authorities within the confines of rules and regulations as have been quoted. To further substantiate his argument, Mr. Nandy brought to our notice the following decisions of the Apex Court:-

- (i) 1992 Suppl (2) SCC 534 (Para 12); and
- (ii) (2001) 5 SCC 482 (Para 5)

8. We have analysed both these cases from the legal point of view and the ratio and substance of the *ibid* decisions and we are of the view that the law points and the facts of the above decisions are not relevant in the instant case.

9. Mr. Nandy concluded his argument by making a further submission in response to Mrs. Dasgupta's point as to why the case could not be taken up for relaxation of age criteria under the powers of the COAS as vested upon him under Rule 149 (c) of Regulation of Army, 1987 (Revised). Mr. Nandy submitted that the case of the applicant is nothing exceptional to merit

dispensation or relaxation of the age by the COAS. Such powers are exercised only in very exceptional cases but the applicant, as observed by Mr. Nandy, has not made out his case to be of such exceptional level. Therefore, it will not be appropriate to hold the respondents responsible not to exercise such option reserved for deserving exceptional soldiers. In view of the above points as brought out by Mr. Nandy, the respondents pray that the matter be dismissed for lacking any merit.

10. We have analysed the entire issue in this matter and have gone into the affidavits and submissions made by the learned counsel from both sides. The sum and substance of the applicant's prayer for promotion lie on the facts that the applicant was approved for promotion from Havildar to Naib Subedar but could not be promoted due to non-availability of vacancy. By the time one vacancy for Naib Subedar occurred in his Battalion (3/9 GR), this Infantry Soldier (Soldier GD), who is the applicant, became overage (beyond 44 years) making him ineligible for promotion. He also was not willing for any extension of service in the rank of Havildar as is evident from his option certificate signed by the applicant on 15.01.2011 (Annex. R-1). Therefore he retired after completion of 24 years of service in accordance with his terms and conditions of service. While adjudicating on this matter, we have analysed the following points:-

(a) Firstly, the applicant attained the age of 44 years on 16.12.2011 thus making him ineligible for promotion to the rank of Naib Subedar which is absolutely in accordance with rules as has been justified by the respondents.



(b) Being an Infantry Soldier in the category of 'Soldier GD', the rules for promotion did not allow the applicant to be transferred from one Battalion to another to avail the facilities of seniority to enable him promotion. It is a fact that in the Infantry, unit/battalion seniority is maintained while according promotion to NCOs and JCOs in Soldier GD category. This is a policy matter which is well within the rules and such policy has never been challenged by the applicant. Therefore the respondents were bound by rules and regulations to consider him for promotion within the unit seniority of 3/9 GR which is the unit of the applicant. In this regard, no injustice appears to have been done by the respondents in any manner. Therefore, there is no instance for supersession while promotion was not given to the applicant.

(c) Although there is a provision for relaxation of age criteria for promotion to be exercised by the COAS in exceptional cases, the applicant at no stage has made out any case for himself to deserve exceptional discretion. In this regard, we have also gone through the service records of the applicant, as submitted before us in original by the respondents. On perusal we find that the applicant has been performing his routine duties to the entire satisfaction of his superiors and has obtained routine professional achievements like his peers within the routine field of duties without any out of the ordinary or exceptional achievements. We have considered the ratio of the Karnataka High Court Judgement *ibid* (N. Bheeman *supra*). The *ibid* judgement relates to a petitioner who made out a case for himself where his commanding officer had considered his service as extremely impressive. In the present case, however, the applicant has not made out any case to deserve such exceptional discretionary treatment. The ratio of the *ibid* judgement thus does not squarely benefit the applicant's case, although the Id. Counsel for the applicant vigorously attempted to draw some parallel between the two.

Therefore, the authorities have committed no injustice in not considering providing him relaxation of age criteria as exceptional case under special discretionary powers of the COAS.

11. The applicant retired after completion of his normal terms of service having completed 24 years of service. He was unwilling for extension of service by two years as per an option certificate exercised by him on 15.01.2011 (Annex R-1). In this aspect, therefore we also find no injustice has been done by the respondents to the applicant.

12. Having considered all the above aspects we have also taken into consideration the analysis of Regulation 149 of Regulation for Army, 1987 as has been carried out in the judgement of Karnataka High Court in Havildar N Bheeman vs Union of India (supra) as it relates to promotion for JCOs.

13. Having analysed the relevant aspects of the ibid decisions we are of the view that while the rules regarding promotion have been adequately analysed, the ratio with regards to consideration of this application (OA No. 117/2012) with that of Havildar N Bheeman case in the ibid Karnataka judgement cannot be equated. For this purpose that we have perused the entire personal records and the profile of the applicant and nowhere have we found him to be exceptional and outstanding with recognition to that effect made by any of the authorities in his entire service career. Therefore this aspect of the ratio of the ibid judgement will not be squarely applicable in this case.

14. In view of what has been discussed above, we do not find any merit in this case, which is accordingly dismissed. There will be no order as to costs.

15. Let original records be returned to the respondents on proper receipt.
  
16. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both parties on observance of due procedure.

( LT. GEN. K.P.D.SAMANTA)

ADMINISTRATIVE MEMBER

(JUSTICE R.N.RAY)

JUDICIAL MEMBER